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WASHINGTON

United States Senate

WASHINGTON, DC 20510–4705

April 8, 2006

The Honorable Joseph Kelliher
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dear Chairman Kelliher,

I write seeking information regarding the Federal Energy Regulatory Commission's (FERC's) existing rules, designed to limit the influence of lobbyists and special interests on Commission decision-making. As you know, Congress has been recently occupied with legislation, focused primarily on reforming itself when it comes to the so-called "revolving door" between Capitol Hill and "K Street," and providing additional transparency and accountability to legislative functions. I have supported these efforts as important steps forward; but at the same time, remain concerned that they do not go far enough in a number of areas necessary to curb the influence of special interests on the federal government.

One of these areas involves the sufficiency of rules governing the interaction of lobbyists and the Executive branch—particularly when it comes to independent Commissions (such as FERC), which were created to monitor and regulate certain sectors or industries. As detailed more fully below, I am seeking clarification regarding the Commission's recusal and *ex parte* communications policies. I am also requesting your input on additional measures that could bolster the transparency of operations for federal regulatory agencies such as FERC.

Commission Recusal Policies: My interest in these matters as they specifically relate to FERC has its roots in the Western energy crisis, which I recognize predates your tenure as Chairman. In November 2002, the Senate Government Affairs Committee released a staff memorandum detailing the findings of its 11-month investigation of FERC's oversight of Enron. At that time, the Government Affairs staff concluded that "documents obtained by the Committee indicate that Enron attempted to directly and indirectly influence FERC's investigation of the California market and subsequent decision-making."

I know you recognize that the events surrounding the Western energy crisis and Enron's collapse remain a source of frustration and hardship for many of my constituents, given the severe impacts on the Pacific Northwest economy and ratepayers. So I hope it does not come as a surprise to you that many in my region were taken aback by the notion—confirmed last week by a FERC spokesman—that that the Commission has hired a former Enron attorney specifically cited in that Government Affairs investigation, and whose files, notes and testimony have also figured in other parts of the federal investigation into Enron's market manipulation schemes.

There is no question that among those most hard-hit by Enron's scandalous collapse into bankruptcy were its own employees, who lost their retirement savings in the process. However, this particular situation also points to a phenomenon that has not yet been fully addressed by Congressional lobbying reform proposals and is by no means unique to FERC: the so-called "reverse revolving door," where former lobbyists or individuals otherwise employed to sway federal agencies are themselves appointed to posts within the government.

My understanding is that regulations promulgated by the federal Office of Government Ethics (OGE) require former lobbyists and corporate executives to recuse themselves from any "particular matter" involving a business with whom they have had a financial relationship in the previous year (5 C.F.R. 2635.502). However, it is largely left up to the individual to define the scope of those particular matters where his/her impartiality may be questioned. Moreover, seeking the input of the employee's supervisor or an agency ethics official remains optional—rather than mandatory—under current federal guidelines.

There have been some recent, high-profile instances within the Executive branch that have exposed the loopholes inherent in these rules and suggest that they may be practically unenforceable. As such, I was hoping to solicit your opinion on how FERC itself implements them, and whether you would support revisions to further strengthen them. Specifically:

- Does the Commission have its own recusal policy, supplemental to the regulations issued by the Office of Government Ethics? If so, what are the terms and how does this policy work, in practice?

- Would you support extending the government-wide recusal period from one to two years or more, for former lobbyists and corporate executives that enter government service?

- Would you support making consultation with an agency ethics official mandatory, in instances where a former lobbyist or executive might be involved with matters impacting a former client or employer?

- Would you support additional penalties for Executive branch officials that break these rules, and/or additional authority for the Office of Government Ethics to take disciplinary actions? Are there other enforcement measures you might suggest?

- Finally, I recognize the Enron case is historically unique, given the length and scope of the investigations and proceedings related to its collapse. More than four years after its bankruptcy, a number of dockets related to Enron's market manipulation schemes remain ongoing at the Commission. In the one instance I'm aware of in which a former Enron employee has been hired by the Commission, how will FERC apply its existing recusal policies?

Ex Parte *Communications*: Another area of concern, particularly when it comes to independent Commissions like FERC, are the "*ex parte*" rules governing communications between government employees and parties to cases they must decide. As I understand it, the idea behind these rules is to ensure that no single entity has undue influence over an agency's decision-

making process, and that all sides in a dispute are given equal opportunity to make their case in an open and transparent fashion.

Over the past few years, I have been very troubled by a couple of instances that, at least in my mind, raised serious questions about the adequacy of FERC's existing rules, or the manner in which they have been interpreted. Again, I also recognize that these instances occurred prior to your chairmanship. However, you are likely aware of the Department of Energy Inspector General's 2003 investigation—initially requested by myself and Sen. Joe Lieberman—in response to media reports that detailed password-protected conference calls involving certain Commissioners and parties involved in Western energy crisis-related cases still pending before FERC. At the conclusion of his investigation, the DOE-IG found that the conference calls in question "could give rise to serious questions of fairness, including, in particular, the appearance that certain interest groups were receiving preferential treatment."

I was also troubled by an episode that occurred last year, in which media reports suggested that FERC commissioners participated in a day-long closed-door session related to regional transmission organization (RTO) policy. At that time, I raised concerns that the format of the meeting constituted a possible violation of the Sunshine Act, the Administrative Procedures Act (5 U.S.C. 552b et seq) and Rule 2201 of the Commission's own Rules of Practice (18 CFR 384.22201) governing *ex parte* communications. While the then-Chairman assured me that FERC had followed the letter of the law, I remained concerned that their spirit had been violated. Given these concerns, I have a few questions about the sufficiency and enforcement of the Commission's rules governing *ex parte* communications. Specifically:

- Please detail the process by which FERC implements its rules regarding off-the-record communications. What is the process by which a Commission employee is designated a "decisional" or "non-decisional" employee in any given proceeding? Who is in charge of enforcing those rules? What are the penalties for violating these rules?

- At the conclusion of his investigation, the DOE-IG made a series of recommendations to help FERC "avoid legal challenge or needless controversy" when it comes to its "public outreach" efforts. Consistent with those recommendations, what steps has FERC implemented since then, "to promote public confidence in Commission proceedings"?

Additional Measures to Enhance Transparency of Commission Deliberations: FERC rules governing recusal and *ex parte* communications are a part of the system of checks and balances designed to safeguard the integrity of Commission decision-making, which is why I am fundamentally concerned with their sufficiency and enforcement. But in the current push to reform government processes, I am also interested in your perspectives on additional measures to shine the spotlight on the activities of lobbyists, as they relate to efforts to influence independent agencies such as FERC.

A search of the Senate's current system reveals more than 1,700 disclosure forms dating back to 1998, in which federal lobbyists have reported contacts with FERC. Given the lack of detail provided on these forms, it is not possible to discern the specific matters on which FERC has been lobbied, and the individuals at the Commission engaged in these discussions—that is, whether they are "decisional" or "non-decisional" under existing Commission rules. Moreover,

the information in its current form makes it almost impossible to cross-reference these lobbying contacts with information available through the Commission's own electronic library.

As such, I am requesting your input on whether the information contained in these disclosure reports, as required under the Lobbying Disclosure Act of 1995, is sufficient for purposes of adequately tracking lobbyists' interaction with Commission employees.

Thank you in advance for your attention to these matters.

Sincerely,

Senator Maria Cantwell